In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. .....

JACK E. ELLIS, an individual doing business under the fictitious firm name and style of General Export Company,
Petitioner,

vs.

THE DE LA RAMA STEAMSHIP CO., INC. (a corporation),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Circuit Court of Appeals discusses several points in its opinion, but decides the case on the question whether the defendant was justified in loading plaintiff's cargo after defendant received knowledge of the attack on Pearl Harbor.

We first mention these other points, merely to get them out of the way. The Circuit Court refers to the dock receipts under which the defendant had the cargo

on the dock. It then proceeds on the theory, that liability for freight did not attach until, at least, the commencement of the loading of plaintiff's goods on board the vessel.

Second, the Circuit Court goes into a long discussion of some of the evidence touching the trial Court's finding VII (that all of plaintiff's cargo was loaded after defendant had knowledge of the Pearl Harbor attack (R. 604)). However, it decides the case on the assumption that the said finding is supported by evidence.*

The Circuit Court of Appeals majority then recites that the defendant's traffic manager and its New York Port Captain, both received notice of the Pearl Harbor attack in New York, on the afternoon of December 7, 1941. It is said at R. 667:

> "Griffin, appellant's freight traffic manager, heard the Pearl Harbor news over his radio about 2:30 P. M. of the 7th *but he did nothing with regard to the Dona Aniceta* on that day. *Captain Meredith did not consult with his superiors.*"

(R. 668):

> "According to the testimony of this official [Suewer] as well as that of Griffin and Meredith there were no changes in the plans for the Dona Aniceta after news of the Pearl Harbor attack."

(R. 670):

> "The [trial] court thought it an unreasonable exercise of judgment on appellant's part to load

*The record contains ample evidence to support this finding. A 3½ page resumé is given in the appendix to this brief.

> the glassware after receipt of news of the Pearl Harbor attack. 'Simple realism', it was felt, militated against any expectation that the voyage could be carried out." (Italics added.)

The Circuit Court of Appeals' majority opinion then adverts to declarations of the government of its intention to *convoy* ships across the Pacific, and says that the refusal of clearance on December 8th was "not conclusive" because "obviously temporary". (R. 672.) There is also recital of considerable evidence (R. 671) showing that defendant did intend to sail the vessel across the Pacific—as if the fact that defendant had the intention, itself tended to prove the intention to be reasonable. In this connection there are included the observations that (R. 670):

> "Naturally, insurance rates went sharply up."

(R. 671):

> "Suewer testified that *perhaps an American or English line would not have felt as his company did about sailing to the Philippines* but even though such lines might have thought it best not to sail, his own, he said, would probably not have followed suit." (Italics added.)

The Japanese attack on Pearl Harbor is thought by the majority of the Circuit Court of Appeals not equivalent to a declaration of war, or formal embargo, nor to have the same legal consequences, it being said (R. 673):

> "The argument is that the attack on Pearl Harbor by the government of Japan constituted automatically a restraint on shipping—The Jap-

> anese attack we think was not a restraint of princes in the sense of the Rotterdamsche Lloyd decision [298 Fed. 443] where the restraint had been imposed by the Netherlands government on its own nationals, and unknown to shippers was in effect when cargo was solicited. There is scant resemblance, legally or factually, between the two situations."

From this, the Circuit Court of Appeals concluded that, *as a matter of law,* there was no basis for the trial Court's finding that the intention to sail was unreasonable (R. 671):

> "The query is whether this was a reasonable purpose, or whether, however laudable, it was so at war with known conditions as to exhibit mere wishful thinking."

(R. 670):

> "With due deference to the opinion of the trial court, we are not able to agree that the responsible agents of the carrier acted arbitrarily in light of the facts coming to their knowledge while cargo was in process of being loaded. The Court is obliged to put itself in the position of the actors 'and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate.' The Styria, 186 U.S. 1, 9".

The District Court had relied on *The Styria,* as authority for the opposite conclusion. (R. 596.)

We now briefly discuss the three grounds set forth in the petition.

I. THE CIRCUIT COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Styria, 186 U.S. 1, and *The Kronprinzessin Cecilie,* 244 U.S. 12, both discuss the rights between shipper and carrier sailing into a probable war zone, when war has broken out or is imminent. In both, the carrier *refused to sail.* In both, this action of the carrier was held justifiable. In the present case the Circuit Court of Appeals holds that *as a matter of law* there is no support for a finding that under similar circumstances the carrier should not have tried to sail, or at least, should not have tried to sail without first consulting the shipper.

A. DEFENDANT'S ACTS MAY BE HELD UNREASONABLE.

1. First, the fact that similar circumstances have been held to justify the carrier in refusing to sail, points to an inferential argument that such circumstances support a finding of fact that the carrier *should not have tried* to sail in this case.

2. But *The Styria* goes further than merely holding a refusal to sail to be justifiable. It repeatedly characterizes the contrary action, quoting with approval the following language from the lower Court or earlier cases:

> (p. 13) "Under such circumstances the owner of contraband cargo (loaded as this was, before war broke out) could with reason insist that it would be *gross negligence* on the part of the ship to bring his cargo forward."
>
> (p. 17) " 'I am satisfied that if the master had continued the voyage with the goods on board, he

> would have been acting *recklessly'*." (Italics added.)

(*The Styria* involved contraband cargo on a neutral ship. The present case involves the vessel of a nation about to become a belligerent. Both sides and both lower Courts in the instant case agree that the situations are analogous. On this phase *The Kronprinzessin Cecilie* has the same facts as the case at bar.)

The Styria also denounces the action of the master in proceeding to load without consulting his superiors (p. 20):

> "The master in either case would have acted *imprudently* if he had not secured the approval of the shipowners, if it were possible to get it before the emergency." (Italics added.)

Thus, the present case presents conduct which this Court characterizes as "gross negligence", "reckless" and "imprudent". This view certainly justifies a finding (such as made by the District Court) that such conduct was *unreasonable as a matter of fact.* In holding to the contrary, the Circuit Court of Appeals has misinterpreted and misapplied *The Styria,* 186 U. S. 1. *The Kronprinzessin Cecilie,* 244 U. S. 12, is to the same effect as *The Styria.*

B. THE ATTACK ON PEARL HARBOR WAS EQUIVALENT TO WAR.

The holding that the attack on Pearl Harbor did not have the same legal effects as a formal declaration of war is directly contrary to both *The Kronprinzessin Cecilie* and *The Styria.*

In *The Kronprinzessin Cecilie* it is said (244 U. S. 12, 22):

> "No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all."

(p. 24):

> "We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he is never at liberty to anticipate war."

The same thing holds true in the present case. Everybody knew that the Pearl Harbor attack meant war.

The Declaration of War itself purported merely to declare a State of War which was already existing:

> Joint Resolution—55 Stats. 795.
>
> Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and people of the United States of America; Therefore be it resolved:
>
> That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and to bring the conflict to a successful termination, all the resources of the Country are hereby pledged by the Congress of the United States.

The Styria contains language which, if anything, goes further (p. 18):

> "It was said that the fear of seizure however well founded, was not a restraint, and that something in the nature of a seizure was necessary. But this argument is disposed of by the cases of *Geipel v. Smith* LR7QB 404 and *Rodoconachi v. Elliott* LR9CP 518. *The goods were as effectually stopped at Hong Kong as if there had been an express order of the Chinese government that contraband of war shoud be landed.*" (Italics added.)

The Styria is based partly on British authorities. Recent English cases are even more pointedly to the same effect:

> *Kawasaki K.K.K. v. Bantham S.S. Co.* [1939], 2 KB 544,

(p. 556):

> "Nobody would have the temerity to suggest in these days that war cannot exist without a declaration of war."

(p. 557):

> "If my view is right that the fact that diplomatic relations had not been severed did not compel the arbitrator to find that no war had broken out, then the matter becomes a question of fact and the arbitrator has found as a fact, in so far as it is a matter of fact, that the animus belligerandi existed."

The Pearl Harbor attack therefore constituted as much a restraint on shipping as a formal declaration of war or a direct seizure.

C. PHILIPPINES AND HAWAII AFFECTED EQUALLY.

There is some discussion in the majority opinion as to whether the defendant steamship company was informed that war had broken out over the Philippines, as well as Hawaii. This distinction certainly cannot upset a finding of fact. We submit it is not valid from any standpoint. If the war zone extended from Japan to Hawaii, *a fortiori* it would extend to the much nearer Philippines. Furthermore, the distinction if valid, would apply only to vessels sailing west-east to the Philippines (across the Atlantic and Indian Oceans). A vessel sailing east-west across the Pacific would have to pass the neighborhood of the Hawaiian Islands in order to reach the Philippines, so would sail *through* the war zone whether the Philippines were under attack or not. It must always be remembered that the District Judge found defendant's intention of sailing to be unreasonable as a matter of fact. The question is whether that finding is supported by evidence. Both *The Styria* and *The Kronprinzessin Cecilie* hold that the prudent thing under such circumstances is not to sail. The inference follows, that an intention to sail under the same circumstances may be held to be unreasonable. In holding the contrary the Circuit Court of Appeals erred.

II. ALTERNATIVELY, THE CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

So far we have discussed *The Styria* and *The Kronprinzessin Cecilie* on the assumption that they lay down correlative rights and obligations for a carrier by water when war breaks out or becomes imminent. Circumstances which give a carrier the right to refuse to sail, also place upon it the duty to refuse, or at least to consult with shippers before proceeding with the voyage.

If this is not so, then the issue of unreasonableness, where the carrier *plans to sail* (instead of refusing) is one not heretofore decided by this Court. The statements in *The Styria* that the carrier's conduct would be "gross negligence", "reckless", "imprudent", would be *dicta*. But if it should be assumed that the question is of first impression, the Circuit Court of Appeals has decided squarely contrary to the *dicta* of this Court in *The Styria*.

We may add one further observation. All of the cases cited on this point by the Circuit Court of Appeals (R. 670) are cases in which the carrier *refused* to sail, and the refusal was upheld. They are used by the Circuit Court as authority for upholding the carrier's action in this case where the carrier *planned* to sail. Such use of authorities based on opposite actions of the carrier implies that the result must always be the same regardless of what the carrier has done.

This, we submit is contrary to the holding as well as the *dicta* of *The Styria*, and contrary to the reasoning which underlies both that case and *The Kronprinzessin Cecilie*.

III. IF THE CIRCUIT COURT OF APPEALS HAS REWEIGHED THE FACTS IT HAS DECIDED CONTRARY TO APPLICABLE DECISIONS OF THIS COURT AND CONTRARY TO OTHER CIRCUITS.

So far we have treated the Circuit Court of Appeals' majority opinion as holding that as a matter of law the facts of the case do not furnish a basis for the trial Court's finding that the carrier's intended sailing was unreasonable.

If the majority opinion should be construed as reweighing the inferences which are to be drawn from the facts then it is contrary to the decisions of this Court (and to other circuits which have passed on the question). The general rule that in a law appeal the findings of the trier of the facts upon conflicting evidence, are final, is unquestioned. The narrower point here involved is that even where evidence is uncontradicted, if more than one inference may reasonably be drawn from the uncontradicted evidence, the question of which inference to draw is likewise a question of fact on which the trier's finding is final. The concrete issue is whether upon the undisputed facts defendant's intention to sail was reasonable or unreasonable. Justice Garrecht's dissenting opinion makes the point that the trial judge's answer to this question

has the same status as a finding upon conflicting evidence (R. 675):

> "such findings have the same force and effect as the verdict of a jury, the same conclusiveness, especially in cases where the important testimony is oral and where the trial judge had the opportunity to observe the witnesses and judge their veracity. Findings of fact will not be disturbed by the appellate court unless they are so clearly contrary to the evidence as to produce in the mind of the reviewers a conviction amounting to a reasonable certainty that they are wrong.
>
> "In the lower Court's finding that the appellant acted in an unreasonable manner in loading the cargo after the knowledge of the attack on Pearl Harbor, I fail to find clear error. The decision of the lower court should be affirmed."

The rule that the proper inference to be drawn from uncontradicted evidence is to be treated as a question of fact is laid down in the following cases:

Lumbra v. U. S., 290 U. S. 551, 553;
Gunning v. Cooley, 281 U. S. 90, 94.

If, for any reason these cases should be thought inconclusive, then the following cases from circuits other than the Ninth, establish a conflict among the circuits:

U. S. v. Ingalls, 114 Fed. (2d) 839, 842 (App. D. C.);
Helvering v. Johnson, 104 Fed. (2d) 140, 141 (C. C. A. 8, aff'd. 308 U. S. 523);
U. S. v. Gamble-Skogmo, 91 Fed. (2d) 372, 374 (C. C. A. 8);

Columbia Nat. Ins. Co. v. Comfort, 84 Fed. (2d) 291, 292 (C. C. A. 8).

In short, if the majority opinion be construed to reweigh the trial Court's inferences drawn from evidence, certiorari should be granted upon the ground of conflict with applicable decisions of this Court, or, in any event, upon the ground of conflict among the circuits.

V. CONCLUSION.

Certiorari should be granted for the reasons hereinabove set forth. Upon full consideration the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Dated, San Francisco, California,
May 25, 1945.

Respectfully submitted,
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(Appendix Follows.)